

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2162 OF 2004

1. Mr. Mangesh Jayavant Dabholkar)
2. Mrs. Archana Mangesh Dabholkar)..PETITIONERS

Versus

1. Shree Ganesh Apartment Co-operative)
Housing Society Ltd.)
2. Mr. Gajanan Ghurye, Chairman)
3. Mr. Mandar Raut, Secretary)
4. Shri Deepak Patankar, Treasurer)
5. Mr. Suhas Shah, Member of the)
provisional Managing Committee)
6. Mrs. Amelia Naronha, member of the)
Provisional Managing Committee)
7. Mr. Jain)
8. Shri Gopal Kamat)
9. Shri Dinesh Desai)
10. Smt. Sneha Desai)
11. Mahindra Ugine Steel Company Ltd.)
12. Shri Keshavrao Patil,)
13. Dr. Pramod Niphadkar,)
14. Dr. Ashok Navratnamal Johari)
15. Specific Cybernatic Pvt. Ltd.)
16. Scope T. & M. Pvt. Ltd.)..RESPONDENTS

Mr. V.R. Dhond i/b. M/s. A.R. Vaidya & Co., for the
Petitioners.
Mr. M.N. Morje for Respondent Nos. 2 to 4, 7 and 8.
Mr. F.K. Shaikh, for Respondent Nos. 15 and 16.
Mr. Ajit Anekar i/b. Paras Kuhad & Associates for Respondent
Nos. 5, 9, 10, 13 and 14.

CORAM: F.I. REBELLO, J.
DATE : 8th September, 2004

ORAL JUDGMENT:

1. Rule. By consent of the parties heard forthwith. By
the present petition the petitioners have impugned the order

of the Maharashtra State Co-operative Appellate Court, Mumbai, dated November 19, 2003 in Revision Application No.658 of 2003. The revision arose from an application filed by some of the respondents under Section 10 of the Code of Civil Procedure for staying the proceedings in view of the pendency of Suit No.3044 of 2002 before this Court. The learned Co-operative Court by order of 15th October, 2003 allowed the application consequent whereupon the proceedings in the dispute are stayed as per Section 10 of C.P.C. till disposal of the Suit bearing NO.3044 of 2002 pending before this Court.

The Revision Application was partly allowed in as much as the

Revisional Court passed the following order;-

. "The Revision Application is partly allowed.

The Co-operative Court shall not decide the question of legality and virus of by-law No.78(a). The Co-operative Court shall also not give finding on the question as to whether the promoter had right to sell, transfer or otherwise alienate car park spaces to the flat purchasers. But the Co-operative Court shall decide only the legality of the resolutions on the ground whether any person other than a member is allotted car parking space or whether any violation of by-law No.78(b) is committed while allotting car parking spaces etc.

The plaintiffs are given liberty to amend the dispute application if they want and such application shall be decided on merits."

2. At the hearing of this petition on behalf of the petitioners it is contended that for the application of Section 10 of C.P.C. the following points must be necessary:-

1. The issue must be common in both the suits.

2. The previously instituted suit should be in the same Court where the subsequent suit is filed. If it is a different Court, the Court where the earlier suit is pending must have jurisdiction to grant the relief claimed in the subsequent suit.

3. Both the suits must be between the same parties.

4. Such parties must be claiming in both the suit under the same title.

Learned Counsel has drawn my attention to the plaint, to the parties and the reliefs sought therein. The principal relief sought in the suit is that the letter dated 15th February, 2002 whereby the defendant Nos. 1 and 2 transferred and/or created right in favour of defendant Nos. 3 or 4 in the car parking space is null and void and of no legal effect. There are other consequential reliefs including a prayer that the defendant Nos. 1 and 2 are not entitled in law to sell/allot/convey/transfer the car parking spaces or otherwise, any part of the compound of the said building, whether shown as another car parking space on the sanctioned plans or not, to any individual flat purchaser or purchasers.

Prayer clause (v) is in the nature of declaration that none of the defendants are entitled to exclusively appropriate for themselves, to the exclusion of the plaintiffs and/or other flat purchasers, any car parking space or spaces. It is not necessary to advert to the other reliefs. Suffice it to say that apart from the purchasers of the flat, the builders are also parties to the said proceedings as defendants. The said suit was instituted on 3rd September, 2002.

3. The plaintiffs in Suit No.3044 of 2002 thereafter raised a dispute before the IIIrd Co-operative Court at Bombay in Dispute CC-III/282 of 2003. This is a dispute raised between the disputants therein as members of the Respnodent No.1 and the opponents therein which included the Co-operative Society, office bearers as allottees of the car parking spaces. The builders are not parties to that dispute. The relief sought for in the dispute is for declaration that Bye-law 78(a) is illegal and, therefore, liable to be struck down. For a further declaration that the allotments made by the Society based on the allotments by the builders to any of the opponent Nos. 2 to 15 to the dispute are against the provisions of the Maharashtra Ownership Falts Act and consequently are nullity and the opponent Nos. 2 to 16 do not get any right to any of the car parking spaces. For a further declaration that the resolution dated 7th January, 2002 and 15th February, 2003 passed by the managing committee in regard to the purported allotment of the car parking spaces are illegal, null and void and are of no legal effect. It is not necessary to advert to the other reliefs prayed. It is in this back ground that the issues raised in the petition will

have to be answered.

4. On behalf of the respondents it is contended considering the subject matter is the parking spaces it was open to the Co-operative Court to have stayed the suit by invoking the provisions of Section 10 of the Code of Civil Procedure. For that purpose reliance is placed on the judgment of the learned Judge of this Court in Murlidhar Datoba Nimanka & Ors. vs. Harish Balkrushna Latane & Ors., 2003 (4) Mh. L.J. 196. It is further submitted that merely because the builders are not parties in the dispute would be of no consequences as the pleadings in the dispute, would indicate that the society has stepped into the shoes of the builder and the action of the society are based on the allotment done by the builder. It is, therefore, submitted that the parties being substantially the same, the subject matter being the same, the order passed by the Courts below should not be interfered with.

5. On a consideration of the pleadings and the reliefs sought for, it will be clear that in the suit filed before this Court what the plaintiffs, petitioners herein, are praying for is for a declaration that the Builders had no right to transfer open car parking spaces in favour of the allottees. This was done before the Co-operative Court had commenced. The defendants are claiming rights in the suit based on the allotment done by the builders in their favour for consideration. It is not the Civil Court that can exercise jurisdiction in respect of the subject matter as otherwise the Co-operative Court can not decide the

controversy between the plaintiff the the builder and the allottee through the builder. which is pending is a dispute between the member, society and other members touching the management or business of the society. Such a dispute considering the provisions of the Maharashtra Co-operative Societies Act can be exclusively entertained by the Co-operative Court only to the exclusion of the Civil Court. In other words in respect of a subject matter touching the management or business of a Co-operative Society the Civil Court would have no jurisdiction. In other words they are not courts of concurrent jurisdiction. The Civil Court, therefore, will have no jurisdiction to decide on the dispute which are pending before the Co-operative Court. It is in that context that the requirement of Section 10 will have to be considered. In *Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd.*, AIR 1998 SC 1952 the issue before the Apex Court arose from a judgment of this Court in proceedings initiated under Order 37 of the Code of Civil Procedure. The question before the Apex Court was whether the meaning of the word 'trial' in Section 10 and whether Section 10 would apply in so far as the provisions of a suit filed under Order 37 of C.P.C. The Apex Court while answering the issue observed that the word 'trial' in Section 10 in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with the summary suit can proceed up to the stage of hearing the summons for judgment and passing the

judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted. In other words upto that stage even the provisions of Section 10 of C.P.C. would not be attracted, but would be attracted at the subsequent stage after the leave to defend has been granted. While discussing the issue the Apex Court has been pleased to observe as under:-

"The object of the prohibition contained in Section 10 is to prevent the Courts of concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. The provision is in the nature of a rule of procedure and does not affect the jurisdiction of the Court to entertain and deal with the later suit nor does it create any substantive right in the matters. It is not a bar to the institution of a suit."

In other words, it is clear that there must be concurrent jurisdiction. In the instant case the jurisdiction is not concurrent. One is within the exclusive purview of the Civil Court and the other is within the jurisdiction of the Co-operative Court under the Co-operative Societies Act. Considering the four tests as we have noted earlier, in the dispute as filed and pending before the Co-operative Court the parties are different, the issues are different as also in the suit the title is claimed through the builder whereas in the

dispute the title is claimed through the society. In other words even considering that Section 10 of the C.P.C. is to be procedural the provisions of Section 10 would not be attracted. In that light of the matter the petition will have to be allowed.

6. It is made clear that this Court at this stage is not deciding as to whether the finding on any issue given by the Civil Court would result in the Co-operative Court being estopped from so deciding or vis versa. All such questions are left open to be considered in the respective proceedings based on the defence which the parties may raise. All this Court has done is to consider whether in the facts and circumstances Section 10 was attracted and the merits of the matter has not been gone into.

. Considering the above Rule made absolute in terms of prayer clause (a). There shall be no order as to costs.

(F.I.REBELLO, J.)